UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 231

Docket No. SF-0752-06-0167-B-1

Fernando S. Eagleheart,

Appellant,

v.

United States Postal Service,

Agency.

December 16, 2009

Paul Maille, Reno, Nevada, for the appellant.

Robert E. O'Connell, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's timely petition for review of the remand compliance initial decision (ID) that dismissed his petition for enforcement as untimely filed. For the reasons discussed below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, REVERSE the remand compliance initial decision, and REMAND the case to the Denver Field Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The undisputed facts underlying this appeal, which are summarized below, are fully set forth in the Board's Opinions and Orders in *Eagleheart v. U.S. Postal Service*, 102 M.S.P.R. 672 (2006), and *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642 (2009).

¶3 In November 2005, the appellant filed an appeal challenging the agency's decision to remove him from his position as a Custodian for unacceptable conduct. I-1 Initial Appeal File (IAF), Tab 1. On December 22, 2005, the parties reached a settlement agreement in which the appellant agreed to withdraw his appeal in exchange for the agency's agreement to rescind the removal, to allow the appellant to resign for personal reasons, and to not seek prosecution of the appellant for his actions. I-1 IAF, Tab 6. The AJ accepted the agreement into the record and dismissed the appeal as settled on December 23, 2005. I-1 IAF, Tab 7. The AJ informed the parties that the decision would become final on January 27, 2006, unless a petition for review was filed by that date. *Id.*

¶4 On the same day that the parties executed the settlement agreement, the appellant executed a Postal Service Form (PS) 2574, Resignation from the Postal Service, wherein he stated that he was resigning from the agency for personal reasons effective December 22, 2005. Compliance File (CF), Tab 4, Subtab 2. Thereafter, on December 28, 2005, the agency processed a PS-50 documenting a Nature of Action Code 317 "Resignation All Other," effective December 22, 2005. CF, Tab 15 at 7. The "Remarks" section of the PS-50 states: "Last Day In Pay Status Pending Inspection Service Case # 0746-1536564-MTL (2)." *Id.*

¶5 On March 3, 2006, the appellant filed a submission with the Board's Western Regional Office alleging that he was "forced, coerced, intimidated and threatened with arrest and jail" unless he resigned. I-1 Petition for Review File (PFRF), Tab 1 at 3. He also claimed that he attempted to withdraw his resignation the same day that he signed the agreement, but the agency intentionally ignored his request. *Id.* at 3, 7. The Clerk of the Board notified the

appellant that it construed the appellant's submission as a petition for review of the initial decision that dismissed his appeal as settled. I-1 PFRF, Tab 2 at 1. In its response to the appellant's petition for review, the agency asserted, inter alia, that it had complied with the terms of the settlement agreement and included a sworn declaration from a plant manager who stated that he had "checked Appellant's OPF [official personnel file] on April 5, 2006 and can confirm that it . . . contains his original resignation." I-1 PFRF, Tab 4 at 6-7; *id.*, Exhibit (Ex.) E (Declaration of Hiram Johnson). In a subsequent filing dated April 14, 2006, the appellant disputed the agency's contentions and alleged that the agency had breached the agreement by processing on December 28, 2005 two Postal Service Form (PS) 50s indicating that he resigned pending an inspection service case. I-1 PFRF, Tab 5 at 1-2.

¶6 In an Opinion and Order dated August 1, 2006, the Board dismissed the petition for review as untimely filed, finding that the appellant had failed to show good cause to excuse a filing delay of approximately 1 month. *Eagleheart*, 102 M.S.P.R. 672, ¶¶ 1, 8, 14. The Board also noted that "the appellant argues the merits of his involuntary resignation claim and asserts that the agency has not complied with the agreement," and advised the appellant that if he "wishe[d] to pursue his claim that the agency has breached the settlement agreement, he should file a petition for enforcement with the Western Regional Office in accordance with the procedures set forth in the [initial decision]." *Id.*, ¶ 5 n.2.

¶7 At some point after signing the settlement agreement, the appellant applied for, and was hired by, the Department of Veterans Affairs (VA). CF, Tab 15 at 10. The VA subsequently proposed the appellant's removal on December 28, 2007, based on his failure to disclose that he had resigned from the agency by mutual agreement because of specific problems. *Id.* The appellant and the VA thereafter entered into a "last chance agreement" on February 28, 2008, wherein the appellant's removal was held in abeyance for an 18-month period. *Id.* at 10-12.

¶8 On May 8, 2008, 21 months after the Board issued its decision denying the appellant's petition for review of the initial decision dismissing his appeal as settled, the appellant filed the instant petition for enforcement of the settlement agreement, which again alleges that the agency breached the agreement by issuing PS-50s indicating that he resigned pending an inspection service case, and thereby failing to issue, for over 3 months, a PS-50 showing a resignation for personal reasons, and requests that his removal appeal be reinstated. CF, Tab 1 at 2-3; *id.*, Tab 6; *id.*, Tab 15 at 1-6. In an August 26, 2008 compliance initial decision, the AJ denied the appellant's petition for enforcement, finding that the appellant failed to establish that the agency materially breached the settlement agreement. CF, Tab 17, Compliance Initial Decision at 1, 4-7.

¶9 The appellant sought review of the compliance initial decision and the Board vacated it, but noted sua sponte that there was an issue concerning the timeliness of the petition for enforcement which had not been addressed below. 110 M.S.P.R. 642, ¶¶ 1, 14 (2009). The Board noted that it was unclear from the record below when the appellant became aware of the alleged breach so as to trigger his obligation to file a petition, and remanded the appeal to provide the parties an opportunity to submit evidence and argument regarding timeliness. *Id.*, ¶ 14.

¶10 On remand, the appellant argued that he first became aware of the agency's breach of the agreement on April 24, 2008 when he had a conversation with a VA human resources manager, who allegedly told him that "the information concerning his removal from the postal service surfaced when his [OPF] was reviewed at OPM . . . ." Remand Compliance File (RCF), Tab 7 at 3, 8. The AJ thereafter dismissed the PFE as untimely filed, finding that in his April 14, 2006 filing with the Board, "the appellant stated that the agency had not complied with the Agreement because the December 28, 2005 PS Form 50s were still in his OPF," and determining that the appellant did not exercise due diligence or ordinary prudence by waiting approximately 2 years after he learned of the

agency's material breach to file his PFE. RCF, Tab 9, Remand Compliance Initial Decision (RCID) at 4-5.

¶11 On review, the appellant repeats his argument that "[t]he specific/conclusive knowledge of the breach came from [the VA] Human Resources Manager . . . on April 24th, 2008," and that he immediately filed a petition for enforcement on receiving this information. Remand PFRF, Tab 1 at 1.

ANALYSIS

¶12 A petition for enforcement alleging a breach of a settlement agreement must be filed within a reasonable time after the petitioner becomes aware of the breach. *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1335 (Fed. Cir. 2002) (citing *Adamcik v. U.S. Postal Service*, 48 M.S.P.R. 493, 496 (1991)). The time is measured from the point at which the petitioner has "actual knowledge of a specific act that constitutes a breach, not merely an unsubstantiated suspicion." *Poett v. Merit Systems Protection Board,* 360 F.3d 1377, 1381 (Fed. Cir. 2004).

¶13 Here, the record supports the administrative judge's determination that the appellant first became aware of the alleged noncompliance on or around April 14, 2006, when he complained of it in the submission he filed with the Board in connection with his petition for review of the initial decision dismissing his removal appeal as settled. *See* RCID at 4-5; I-1 PFR File, Tab 5 at 1-4. The appellant appears to have raised the allegations of noncompliance in response to documents the agency submitted just 1 week earlier in support of its position that the agreement was not breached. *See* I-1 PFRF, Tab 4 at & 6 Ex. E (Johnson declaration). There is no indication in the record that the appellant knew or had reason to know of the breach before he reviewed those documents. In addition, when the appellant pointed out the breach, he requested the very action,

rescission of the agreement and reinstatement of his appeal, *see id.*, Tab 5 at 4, that he now seeks in the instant petition for enforcement.

¶14 Under the particular circumstances of this case, even though the appellant did not file a formal petition for enforcement until May 8, 2008, we find that he acted diligently in earlier attempting to use the Board's appellate processes to seek a remedy for the agency's alleged noncompliance with the settlement agreement in his removal appeal. We find further that he filed his petition for enforcement of the settlement agreement within a reasonable time after he became aware of the agency's noncompliance. Therefore, we find that the appellant timely filed his petition for enforcement. *See* 5 C.F.R. § 1201.182(a); *cf. Tarin v. Department of the Army*, 70 M.S.P.R. 234, 240-41 (1996) (treating allegations of noncompliance raised in an appellant's disability retirement appeal as a timely filed petition for enforcement).[*]

¶15 We also find, for the reasons set forth in our Opinion and Order in *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶¶ 11-13 (2009), that the agency's 3-month delay in meeting its obligations under the settlement agreement constituted a breach of that agreement, and that the breach was material.

¶16 When one party commits a material breach of a settlement agreement, the other party is entitled to either enforce the settlement agreement or to rescind it and to reinstate his appeal. *See Mullins v. Department of the Air Force*, 79 M.S.P.R. 206, ¶ 12 (1998). Although the appellant requested below that his appeal be reinstated, *see* CAF, Tab 15 at 6, he may wish to reconsider his request in light of the fact that reinstatement of the appeal could only occur if the agreement is rescinded. If the agreement is rescinded, the settlement terms

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[*] Our finding that the appellant's petition for review in *Eagleheart v. U.S. Postal Service*, 102 M.S.P.R. 672, ¶¶ 1, 14 (2006), was untimely filed does not speak to the timeliness of the appellant's allegations of noncompliance therein when considered as a petition for enforcement. *See Davis v. Department of the Navy*, 55 M.S.P.R. 109, 112 n.1 (1992).

become inoperative, and the parties are essentially restored to the status quo ante. *See id.* at ¶ 13; *Stipp v. Department of the Army*, 64 M.S.P.R. 124, 127 n.1 (1994), *overruled in part on other grounds, Wisdom v. Department of Defense*, 78 M.S.P.R. 652 (1998). The appellant would thus risk losing any benefits he has received under the agreement. Accordingly, on remand, the appellant must be permitted to make an informed choice between rescinding and enforcing the agreement. *See Mullins*, 79 M.S.P.R. 206, ¶ 13. If the appellant chooses to rescind the agreement, then the removal appeal must be adjudicated on its merits.

ORDER

¶17 We REMAND this appeal to the Denver Field Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.